United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1140

To Be Argued By
BERNARD S. MEYER

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID STIRLING, JR., WILLIAM G. STIRLING, HAROLD M. YANOWITCH, EDWIN SCHULZ and RUBEL L. PHILLIPS,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANT-APPELLANT HAROLD M. YANOWITCH

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UNITED STATES COURT OF APPEALS
FILED
DEC 9 1977
SECOND CIRCUIT

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Abbreviations

References to the Joint Appendix and Exhibit Volumes filed on behalf of defendants-appellants David Stirling, Jr., William G. Stirling and Harold M. Yanowitch are indicated by the letters "A" and "E", followed by the number of the page at which they appear, e.g., "A 423", "E 224".

References to Transcript pages, Government Exhibits, Defendants' Exhibits and defendant Schulz's Exhibits not appearing in the Joint Appendix or Exhibit volumes are indicated by the prefixes "Tr.", "GX", "DX", and "Schulz Ex.", respectively.

UNITED STATES DISTRICT COURT

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1140

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID STIRLING, JR., WILLIAM G. STIRLING, HAROLD M. YANOWITCH, EDWIN SCHULZ and RUBEL L. PHILLIPS,

Defendants-Appellants.

REPLY BRIEF OF APPELLANT HAROLD M. YANOWITCH

Preliminary Statement

The Government's review of the evidence presented against Harold Yanowitch largely ignores the omissions in its proof which were noted in this appellant's brief. Moreover, in numerous instances, the Government's description of the case rests upon its own characterizations, not the evidence and documents introduced below. It is even more unfortunate that in proffering these characterizations as evidence, the Government has dwelled at length upon activities which bore no relation to the particular acts and omissions charged against Yanowitch.

This reply brief shall confine itself to the four specific areas framed by the indictment, and shall not deal directly with the Government's imaginative but inaccurate description of peripheral events. However, we would ask the Court, before accepting characterizations as evidence, to examine the record carefully, since in good part the Government's claims against Yanowitch are based upon the authorship of memoranda mistakenly attributed to him (e.g., GX 456 at 76,417 [Government Brief ("GB"), pp. 66-67]); statements contradicted by the Government's own witnesses (e.g., McCann's delivery of the "only records" of Homex checks [GB, p. 42; compare Tr. 224-25]); and documents which are either misleading or mischaracterized (e.g., the Virgin Island's "cancellation" telegram, sent one day before the customer executed an audit confirmation [GB, pp. 39-41; compare GX 573 with GX 252A at 21,840-41]).

However, such distortions of the record are minor in comparison with the Government's overall portrait of this defendant's role at Homex. Harold Yanowitch was a Rochester attorney practicing in a three-man law firm at the time that he joined Homex. As its general counsel, he never once claimed any expertise in any of the areas of the law which this case involves. He hired the best outside counsel, accountants and staff attorneys he could find, and not one of them claimed that he had ever refused to answer their questions or given them misleading answers. Because he believed in the company's future, he never sold a single share of its stock, and thus lost his life savings

in the Homex bankruptcy.

We remind the Court of these facts because, on any fair reading of the record, this was an exceedingly close case. At various times, the jury was asked to believe that the Peat, Marwick ("PMM") workpapers, admittedly "edited" by a PMM partner who never testified, were an accurate representation of the extent of Homex's disclosure to its auditors; that Yanowitch would have asked a prominent Mississippi attorney, twice candidate for Governor, to forge a $15 million committment letter; and that oral "guarantees", not involving a nickel of Homex's fun[illegible] were something more than the mere puffery usually associated with the sale of undeveloped real property. The unmistakeable impression is left that without the gloss added by the Government and in the absence of the errors committed by the trial court, a man such as Harold Yanowitch would not have been convicted.

The Land Transactions

As more fully set forth in the Stirlings' Reply Brief ("StRB") at pp. 4 - 6, all of the land transactions share certain characteristics -- full disclosure in Homex's SEC filings as extraordinary income, disclosure of the deferred aspect of each sale, a price reflecting the properties' fair market value, and, assuming the existence of the alleged "side promises", no purchaser received an obligation enforceable against either Homex or an individual.

(a) Raseac Realty

At various times in its brief, the Government characterizes the alleged oral "guarantee" made to Barbato, Falcone and Shapiro as "guaranteeing the buyers against 'losing any money' on the transaction (Tr. 856-57, 888)" or that "if the zoning restriction were not removed, the buyers would not have to honor the terms of the mortgage" (GB, pp. 11, 12). In point of fact, none of the witnesses testified to any such promises, and Barbato himself summarized both Yanowitch's and David Stirling's statement as follows:

> "The sum and substance was that we wouldn't be losing any money on it if we bought it. This was just verbal, of course." (A 225)

Putting aside the fact that no vendee ever lived who did not hear this type of statement from his vendor, none of the participants testified to anything which even remotely resembled the "guarantee" claimed by the Government. Thus, Barbato claimed that Yanowitch had told him that the investment did involve a minimum amount of risk, and one proposed participant, Jack Feinglass, was so unimpressed by the alleged "guarantee" that he dropped out immediately after the zoning restriction was discovered by attorney Beckerman (Tr. 769, 877, 933). Indeed, Beckerman's notes (cited at GB, p. 11) leave no doubt that the Raseac transaction was based more upon an unenforceable hope than a promise:

> "he [Shapiro] realized this was a 'good faith deal of Harold Yanowitch', had to rely on

Harold's integrity -- was willing to go ahead despite the problems" (GX 342 at 79,446).

The absence of the guarantee was further proven by the fact that, in the one instance where Beckerman asked for some type of written commitment from Homex or an individual, he was flatly refused (A 228).* Indeed, when Beckerman subsequently met with Reuben Davis (Homex's associate general counsel) in July 1970 to discuss getting out of the property, no reference was made to the so-called side promises.**

As a second "side promise" to the Raseac transaction, the Government charges that Messrs. Garrity and Frank, who

*The Government attempts to play down this refusal by suggesting "further promises that they [Barbato, Falcone and Shapiro] would be 'getting some stock in Stirling when it went public'" (GB, p. 11). The cited testimony does not support any inference that admission to Homex's original issue list was contingent upon their participation in the Raseac transaction.

The Government also claims that the reason for the refusal itself was the fact that Homex was "going public" (GB, p. 11). Once again, the testimony which the Government cites for this proposition simply fails to bear it out: Beckerman testified to a "vague recollection" that either Yanowitch or Garrity "indicated that Stirling would be going public and that they couldn't for other reasons I don't recall sign such a document." (A 228; emphasis added) The likelihood that Homex's public offering would have affected the possibility of reducing the alleged guarantee to writing is nil, since Shapiro recalled that, from the outset, Yanowitch had dispelled the possibility of any guarantee, verbal or otherwise, from Homex itself (A 221).

**The Government's citations to Beckerman's testimony and letter to his clients (GB, p. 18) fail to support its claim that he referred to, let alone "demand[ed] performance", on the "side promises" allegedly made by Yanowitch in the spring of 1969. Davis' own account of that meeting is also silent on the so-called "side promises" (Tr. 1244-47). Since Yanowitch was not even employed by Homex at the time the first promise was allegedly made, this silence (but not the Government's characterization) is understandable.

bought the stock of Raseac Realty from Barbato, Falcone and Shapiro* were paid off "by increasing at least eightfold . . . the 'legal fees' paid for such services as nightly reading of magazine articles about housing" (GB, p. 31). This claim, while no doubt colorful to the jury, bears little relation to the evidence. Between June, 1969, when Yanowitch lefts Messrs. Garrity and Frank to go to Homex, and early 1971, before Garrity and Frank took over the Raseac stock, the firm's billings to Homex had increased from $300 per month to as much as $3,000 per month -- a tenfold increase (Tr. 1115-16). The most significant raise in Garrity & Frank's billings came in 1972, when, at Frank's suggestion, the firm's hourly rate was raised to the same hourly rate charged by another Rochester law firm (A 291-95). Furthermore, although a decidedly minor part of his work for Homex, Frank performed various public relations tasks for the company which required him to keep apprised of current developments in the modular housing field and, in particular, publicly financed housing (A 301). At no time did the Government claim below that reading "magazine articles about housing" formed a material part of Garrity & Fank's bills. Indeed, given the fact that Frank, an immunized Government witness, unequivocally testified that all of the services performed for Homex

*The Government mistakenly asserts (GB, p. 31) that the Raseac stock was actually transferred back to Homex. In point of fact, the stock certificates were endorsed in blank and delivered directly to Messrs. Garrity and Frank.

were legitimate and bona fide and that Yanowitch had never "directly or indirectly" told him to pad his bills, the alleged "pay-off" was non-existent (A 296-97, 300-06).

The balance of the charges relate to the alleged attempt to hide the state of the Raseac receivable from Homex's auditors in August 1969 and September 1970. As to the former, the Government refers exclusively to the testimony of a Harris Kerr Foster ("HKF") accountant who candidly stated that he "didn't recall" what he had asked Yanowitch about the transaction, and whose memorandum (GX 93e) was apparently never shown to Yanowitch (Tr. 3211, 3221-23).* The evidence with respect to the following year's audit is even less impressive: Homex's other Executive Vice President, Richard E. Karkow, wrote a letter which, while noting the default, stated that plans were going ahead to develop the property as a shopping center, that the adjacent road had been widened into a four-lane highway, that population in the surrounding area had increased significantly, and that Raseac's management is "actively negotiating

*The Government claims, on the basis of this memorandum, that Yanowitch falsely told the auditor that "(1) there were no common shareholders between Homex and Raseac; [and] (2) that he personally knew . . . that Raseac would 'be able to honor the terms of the mortgage'" (GB, p. 12). Since Homex did not go public until February 1970, it is difficult to perceive whether the first representation, even if made, could be false. Moreover, the Government's assertion that the latter representation was false -- because of the "commitments that, if the zoning restriction was not removed, the buyers would not have to honor the terms of the mortgage" -- is belied by both Barbato's description of the "commitment" and Davis's refusal, one year later, to suspend the mortgage payments.

with prospective shopping center tenants, and that a recent appraisal had valued the land in excess of the outstanding mortgage receivable" (GX 95c at 5241-42; E 393a). Significantly, neither Karkow's letter nor the appraisal were ever linked to any of the defendants, and Karkow himself was never called by the Government to testify.

(b) Kece Associates

The Government's review of the Kece Associates transaction is more fully discussed in the Stirlings' Reply Brief at pp. 6 - 9.

With respect to Yanowitch's role in this transaction, the Government's chief claim is that he signed the deeds to Kece and drafted the letter of intent (E 380-81), and, since he "did not claim that he had inquired of David Stirling . . . and received an inadequate report", may be charged with both participation in the transaction itself and "a default under the 'affirmative duty to investigate' imposed upon him by the securities laws" (GB, pp. 68-69, 69n). Unfortunately, the Government never indicates how Yanowitch's ministerial tasks would have led him to suspect anything misleading about the transaction, especially since the sale of the land to Kece was not contingent upon the performance of the letter of intent.* The simple fact is that Yanowitch did not know of any

*The Government also makes the cryptic assertion that Yanowitch's discussion of ASR No. 95 with Mauriello in connection with the 57 & 31 transaction, months after the Kece sale had been included by HKF in the Pressprich prospectus, should have alerted him to "the need for the same sort of disclosure as to Kece." (GB, p. 69). The Government, quite wisely, does not attempt to explain how Yanowitch's discussion of the Route 57 & 31 sale would have triggered any misgivings about the Kece sale.

defect in the Kece sale, and, assuming that such defect existed, had no reason to believe that it was not a bona fide sale.

(c) 57 & 31 Development Corporation

The 57 & 31 transaction is more fully discussed in the Stirlings' Reply Brief at pp. 9-12.

In attempting to find some basis for charging this transaction against Yanowitch, the Government claims that Yanowitch withheld from the disclosures to the SEC "the David Stirling guarantee against losses", which he must have known about because he had "a sufficient report of [Stirling's] negotiations with Grago and Wynn to instruct Davis personally to prepare the contracts and to obtain Mauriello's opinion." (GB, p. 70). This argument is predicated upon the assumption that Stirling told Yanowitch about this "guarantee", which Wynn described as "[David] extended his hand to me and said, 'Bud, you won't get hurt by this deal.'" (A 237a). Moreover, the "sufficient report" to Davis which the Government relies upon appears to have been no more than the name of the purchaser and the terms of the sale (A 312-13; Tr. 1264; GX 580 at 909,077).

Stock Purchases for Union Officials

The Government's case with respect to the purchase of stock for union officials is discussed in the Stirlings' Reply Brief at pp. 13-17, which discussion is incorporated by reference herein.

Mississippi Sales

The Government's case, as it relates to the Greater Gulf transactions, essentially involved the alleged forgery of a Farmers Home Administration commitment letter (E 408-09) and the dispute as to whether or not the units covered by the 800-module contract had to be manufactured in Mississippi.

As to the latter, Phillips euphemistically concedes that Greater Gulf's confusion as to the source of the modules proceeded from "a minor subterfuge to get around a technical bureaucratic objection" (Phillips' Brief, p. 4): he gave Rubel Griffin, Greater Gulf's attorney, written assurance that, even though the 800-module contract contained no clause requiring manufacture in Mississippi, the company would in fact manufacture them in Mississippi (E 410-14). There is no evidence that Phillips ever advised Yanowitch or any other Homex executive of his "minor subterfuge" before he did it, and Yanowitch's response when he was informed of it was unequivocal: "he said that was entirely unacceptable" (Tr. 4981). Significantly, Griffin had no recollection of whether Phillips had passed Homex's response to the "Mississippi clause" on to him (Tr. 1913-14). However, he was certain that less than three months later he had executed a PMM confirmation attesting to the viability of the 800-module contract (Tr. 1882-84). Given Phillips' subterfuge, Yanowitch's expressed displeasure, and Greater Gulf's subsequent confirmation of the contract, there is little doubt

that Yanowitch was misled by Phillips' duplicity and Griffin's carelessness.

The evidence relating to Yanowitch's involvement with the Greater Gulf commitment letter was even less impressive. The sole nexus between Yanowitch and the forgery of the letter was Phillips' confession to Richardson that he "was being pushed by Mr. Yanowitch to get some letter back up to them that was going to be placed in the files and never would be seen . . ." (A 316). Richardson did not specify who had said the letter would never have been seen, but it certainly could not have been Yanowitch, who proceeded to show it to everyone -- auditors, bankers and Mauriello.* In point of fact, this was not the first time that Phillips had duped Yanowitch, since he was never told about the problems which Phillips was encountering on Homex's Louisville, Mississippi project (Tr. 1450-51). And,

*The Government argues that, while Yanowitch displayed the letter, he must have known it was a forgery because he did not permit copies of the letter to be made prior to a March 1971 news conference announcing the 800-module contract (GB, p. 29). For some reason, the Government fails to note that the news conference was held (DX 140), and that because of the possibility of press leaks, Homex had never permitted copies of commitment letters to be made public until after they had been publicly disclosed. It is curious that the Government seizes upon Yanowitch's caution as "proof" of his guilt.

The Government also claims that, to provide "promised secrecy", Yanowitch had Mauriello "erase all references to [the commitment letter] in his draft opinion" (GB, p. 29). This argument is belied by a comparison of Mauriello's drafts (GX 677, 679), which reveals that the commitment letter was identified only by date, not agency, and that the deletions were made to conform the opinion to the language of the Greater Gulf contract (GX 111), which only specified "financing from an agency or agencies of the state or federal government."

as Phillips himself concedes by his "minor subterfuge" in May 1971, the forgery of Richardson's signature was not the last time that Yanowitch would be duped.

The balance of the Government's treatment of the Greater Gulf transaction is devoted to an assortment of characterizations which do not bear on the issues. Thus, the Government suggests that David Stirling and Yanowitch had planned that Greater Gulf would be "feigning solicitations for bids from module manufacturers" even though the contract had already been awarded to Homex (GB, p. 26). The entire assertion is based upon two internal memoranda by Carl Wren, a Homex public relations officer, which bear no indication of transmission to or receipt by any of the defendants (GX 131, 140). Similarly, the Government implies that these defendants must have known about the impossibility of getting FHA funds because in their meetings with FHA officials "it was clear that they could be of little aid because of limitations" -- $750,000 for each project -- "on their funding authority" (GB, pp. 26-27). This argument ignores the fact that, from the outset, the 800-module contract was to be an umbrella commitment to cover as many as 20 separate projects, as well as the fact that Phillips had never told Yanowitch of the problems he had encountered on the Louisville project then underway (A 324; DX 712, 713).

The Greater Gulf aspect of this case, from its hopeful beginning to its ignominous end, was a Rubel Phillips production and its biggest victims were David Stirling and Harold

Yanowitch. The bulk of the charge, aside from Phillips' "minor subterfuge", is predicated upon defendants having failed to suspect that a respected attorney, twice candidate for Governor of Mississippi, could forge a $15 million commitment letter, or that Caron, Greater Gulf's volunteer president, would have been so engrossed in having dinner with his friends that he would not bother to read that letter when he signed it (Tr. 1799-1800).*

Accounting Practices

The Government's review of the evidence with respect to Homex's accounting practices (Indictment, ¶¶ 13, 15 [A 15-16]) is more significant for what it omits than for what it contains. Although the Government relies principally upon the testimony of a partner in PMM's New York office, William Murray, it fails to note that this witness never worked on a Homex audit and was strictly the "engagement partner" for the Homex account. The "auditing partner" was Michael Horn of PMM's Rochester office, who was never called as a witness.** Horn's absence from the trial is readily explained by his

*In his Reply Brief, Phillips makes the claim that "evidence admitted show[ed] that another defendant, Harold Yanowitch, with whom Mr. Phillips dealt, knew the transaction was fraudulent (Tr. 2306)" (p. 5). Phillips' candor with this Court roughly approximates his candor with Yanowitch, since the cited testimony is a former secretary's "very vague recollection of [pulling files] of Gulf Coast material" for Yanowitch's review after he had left Homex in June 1972.

**J. Thomas Woods, a CPA employed by PMM's Rochester office, was called as a hostile witness by defendant Schulz.

destruction of some of his audit workpapers immediately after PMM was served with an FRCP 34 request in 1972 (Tr. 4823-26).* Thus, the Government's case against defendants was based largely upon an accountant with no first-hand knowledge of the audit, who was relying principally on workpapers which had been edited by his Rochester partner. However, apart from this questionable evidentiary base, the case against defendants is weak.

Thus, with respect to the reassignment issue, PMM's own workpapers reveal that it was informed of the fact that modules were switched from one contract to another (Tr. 3449; GX 809; Schulz Exhibit B-17). Moreover, even though Schulz -- without informing the Stirlings or Yanowitch -- had removed the back-up invoices reflecting their reassignments, the PMM auditors saw explanatory footnotes to the general journal which explained each reassignment (A 345-47).

Significantly, the Government suggests that when Murray described Homex's policy with regard to booking sales to the SEC in July, 1971 -- in a memo he himself had drafted (Tr. 3458; GX 55) -- he was oblivious to Homex's practice of reassigning modules (GB, pp. 36-37). However, Schulz certainly informed Murray of this practice no later than March 1971 (Tr. 3449), and Horn and Woods had known prior to that meeting of reassignments of more than $1 million in modular sales in a period of less than three months (Tr. 4779-80). If Murray had spoken to his

*PMM has asserted multi-million dollar cross-claims against defendants and would profit greatly in their several actions upon defendants' conviction of securities fraud (Tr. 3459).

auditing partner, he could not have been unaware of the fact that modules were often reassigned from contract to contract.*

Similarly, the Government's case against Yanowitch on the 1970 cost overruns (Indictment, ¶ 15(a)) relies upon a mistaken attribution and false characterization of HUD letters. Thus, to show defendants' direct involvement in misleading PMM, the Government extensively quotes "Yanowitch's weekly written report to both the Stirling brothers" which recited a future "actual down-to-earth effort" to obtain reimbursement from HUD (GB, pp. 66-67, quoting GX 456 at 76,417). The memo itself is a weekly report from another Homex attorney, Thomas Santa Lucia, and indicates that acknowledgment of the indebtedness -- albeit not necessarily collection -- would soon be forthcoming (Ibid.).** Moreover, the record evidence indicates that HUD's replies -- inexplicably characterized by the Government as "phony" -- were genuinely reassuring in light of Homex's history of collecting past over-runs.*** There is no evidence

*Woods testified that he believed that such reassignments would be improper if done on a "regular basis" but was uncertain whether or not his belief has ever been transmitted to Schulz (Tr. 4790, 4798). Likewise, Murray was unable to state whether anyone from PMM had given this advice to Homex management (Tr. 3452). Of course, if this impression was never transmitted back to Schulz, it certainly did not reach Yanowitch or David Stirling.

**The Government is more candid with respect to the only other piece of evidence linking Yanowitch with the cost over-run problem, reciting that "Schulz's January 21, 1971 memo to Yanowitch [GX 634 at 56,518-9] does not actually recite the decision to delay the entry from the previous period . . ." (GB, p. 71).

***In fact, HUD paid 85% of the over-runs claimed by Homex on the first five projects (compare Schultz Exhibits B-15 and B-21 with E-7).

that PMM was misled by Schulz in its review of the facts relating to these projects before PMM stated that Homex could properly record the 1970 and 1971 over-runs as accounts receivable. (Schulz Exhibits B-13, 14, 21, 24, 26, 27; Tr. 4760).

With respect to the U.S. Shelter fee for the Greater Gulf financing (Indictment, ¶ 15(b)), the Government essentially claims that Yanowitch knew this was improper because he was aware that the Greater Gulf transaction was predicated upon a forged FHA commitment. Significantly, Richardson's testimony and Phillips' own admissions would indicate that Yanowitch was duped by Phillips into believing that the FHA commitment was genuine. See pp. 10-13, supra.

Finally, Murray's own testimony negates any allegation of impropriety in connection with the capitalization of expenses related to the Mississippi plant (Indictment, ¶ 15(c)). When asked to state his conversations with Schulz with respect to the treatment of these costs, Murray recollects that "I just told [Schulz] . . . that [capitalization] is just the way it has got to be, and he had said fine" (A 400-401).* Since Murray unequivocally testified that capitalization was proper -- regardless of the existence of the reimbursement clause in the bond contract -- there is no substance whatever to the Government's claim.

*Horn himself had discussed this with Murray, and approved of this procedure in March, 1971 (GX 867).

Argument

I

THE COURT'S GRATUITOUS SUGGESTION OF PERJURY WAS UNDER THE CIRCUMSTANCES OF THIS CASE PLAIN ERROR (Replying to Point VI A of the Government's Brief)

The Government contends that the instructions complained of in defendants' briefs (St.Br. 48-50; Y. Br. 54-56) worked no prejudice against defendants and that the point is not available to defendants because no objection was taken.

The short answer to both arguments is United States v. Fischer, 531 F.2d 783 (5th Cir. 1976), decided by the same Court that decided United States v. Cisneros, 491 F.2d 1068 (5th Cir. 1974) (previously cited in defendants' main briefs). The instruction under consideration in the Fischer case was:

> "I feel constrained to point out that someone obviously didn't tell the truth from the witness stand in this case. Use your own common sense to aid you in determining who did and who didn't. Consider, if you can remember what you wore a week ago Tuesday, let alone what everyone in the room wore eight months ago when you had reason to remember such details."

Holding that charge prejudicially erroneous, the Fifth Circuit said:

> "We agree with appellant that this instruction, when viewed in the context of the entire case, was an improper comment upon the credibility of the defense witnesses. It has long been recognized that a district judge may explain and comment upon evidence in his instructions to the jury. See Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L.Ed. 1321, 1324 (1933). However, of

> equally long standing is a significant limitation upon that right. Because of the great influence which the trial judge necessarily exerts upon the jury, the court must exercise the most scrupulous care to avoid giving an unfair or one-sided impression. Id. at 470. 53 S.Ct. at 699, 77 L.Ed. at 1325; Starr v. United States, 153 U.S. 614, 625-26, 14 S.Ct. 919, 923, 38 L.Ed. 841, 845 (1894). This limitation was not observed in the present case. Here, as in United States v. Cisneros, 491 F.2d 1068 (5th Cir. 1974), the essential testimony of the two sides was in 'stark, irreconcilable conflict', id. at 1075. Indeed, the government has conceded that 'the credibility of the witnesses was squarely presented as the decisive issue.' Brief of Appellee, at p. 6. We feel that as in Cisneros, the trial judge's comments below unduly trespassed upon the jury's function of determining the credibility of witnesses."
>
> --531 F.2d at 786
> (emphasis added)

To be sure, in the Fischer case, the trial judge had refused to give an instruction that the jury was not bound by what the judge said, whereas in this case, the trial judge did tell the jury at the beginning of his charge that:

> "Nothing that I say may or should suggest to you any view of mine on how you are to decide the questions that are for you to decide. So far as we are concerned . . . , I have no views on these issues because they are for you" (A 559).

However that instruction came well in advance (some 100 pages or roughly two hours) of the perjury statement (A 657). It is also true that as part of the "boiler plate" instruction on assessing credibility, which followed after the perjury statement, he told the jury that "it will be your responsibility and your sovereign authority to decide which one of them you believe"

(A 658), but the phrase "your soverign authority" is even more cursory than was the charge given in United States v. Nazzaro, 472 F.2d 302, 313 fn. 11 (2nd Cir. 1973) and, like the Nazzaro charge, must be held insufficient to cure the error involved in the perjury charge, whether by itself or together with the much earlier "Nothing that I say" charge.

Moreover, the perjury statement must be considered together with those portions of the charge pointing out the interest of the defendants who testified and emphasizing the special trustworthiness of those government witnesses who testified under grant of immunity conditioned upon telling the truth, and in light of the Government's heavy emphasis during trial on the latter point (A 298-99, 317-19, 344a-346, 361, 474) and emphasis in summation on credibility (Tr. 5649-5650). While this Court has in United States v. Tolkow, 532 F.2d 853, 859 (1976) approved the self-interest charge when accompanied by the statement that the fact of interest does not mean the witness lied, and such a statement was made by the trial judge in this case (A 661), it has also made clear in United States v. Araujo, 539 F.2d 287, 290-291 (1976) that the trial judge should avoid interjecting his own personal views, which in this case was not done. And with respect to the government witness charge, while this Court has sustained such a charge in United States v. Araujo, supra, it did so only after noting that the trial judge in that case had told the

jury at least four times that they were the sole arbiters of credibility. See also United States v. Natale, 526 F.2d 1160, 1167-68 (2nd Cir. 1976), cert. denied, 425 U.S. 961 (1976) (no prejudice where trial judge reminded jury "in forceful language" on at least seven occasions of its exclusive prerogative to determine the facts).

While a trial judge should not be required to repeat cautionary instructions ad nauseam, it should be held, in a case turning so largely on credibility, that the cursory and unforceful reference to "sovereign authority", the failure to tie the cautionary instruction in with the comment that "you probably heard more than once perjury from the witness stand in this case", and the instructions following almost immediately thereafter that defendants were self-interested (implying that they were likely to lie) and that the Government's witnesses testifying under immunity were unlikely to lie, was so unfair to defendants as to constitute not only error but plain error requiring reversal, notwithstanding the absence of a specific objection. See, e.g., United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971), cert. denied, 414 U.S. 1023 (1973) (comment concerning defendant's character plain error); People v. Aiello,-A.D.2d- (2d Dep't 1977)[N.Y.L.J., 4/22/77, p.12, Col.3]. As in Tillery v. United States, 411 F.2d 644, 648 (5th Cir. 1969), holding omission of an accomplice instruction to be plain error, so here "each juror had to weigh the evidence as

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jury at least four times that they were the sole arbiters of credibility. See also United States v. Natale, 526 F.2d 1160, 1167-68 (2nd Cir. 1976), cert. denied, 425 U.S. 950 (1976) (no prejudice from judge's comments on facts when jury told three times they were the sole judges of the facts); United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961; (1976) (no prejudice where trial judge reminded jury "in forceful language" on at least seven occasions of its exclusive prerogative to determine the facts).

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to [defendant's] guilt or innocence and reach a difficult, delicate decision without the benefit of an instruction.

II

THE COURT'S CHARGE WITH RESPECT TO RELIANCE UPON EXPERTS WAS ERRONEOUS
(Replying to Point VI B of the Government's Brief)

The Government's response to the reliance issue argued in Appellants' Point II is threefold: (1) the point was not sufficiently brought to the attention of the trial judge by the request jointly made by defendants Stirling and Yanowitch; (2) the Stirling defendants were not entitled to the charge in any event because their evidence did not sufficiently present the issue of reliance to require such an instruction*; (3) the failure of the expert to discover the irregularities in issue is irrelevant under a statute requiring disclosure.

There can be no question that the reliance issue was brought to the attention of the trial judge. Not only was there testimony on the issue from defendants David Stirling and Harold Yanowitch but also the Government called the experts in question and through them presented to the jury testimony intended to show that sufficient disclosure had not been

*By omitting any reference to Yanowitch from the footnote on page 114 of its brief, the Government tacitly concedes that as to him there was sufficient evidence.

made.* Not only did the Stirlings and Yanowitch submit their joint request (A 145) which called for acquittal if "the defendant relied in good faith on the expertise of the accountant," but also the trial judge in passing on another of defendants' requests during the charge conference stated (A 520): "I will tell them that good faith is an absolute defense in this case." Moreover, the Government submitted its Supplemental Request on "Reliance on Experts" (A 173), the essence of which was the charge as given by the trial judge (A 601-602). During the recess which followed a few minutes after that charge had been given, Mr. Gaynor asked the Court to add to its charge on reliance, stating (A 615):

> "MR. GAYNOR: Your Honor, I did read, of course the proposed charge on reliance, but as I listened to your Honor it occurred to me that perhaps your Honor would consider adding something to there which I have drafted and it is very short. May I read it?
>
> "THE COURT: No. I mean the short answer is no. The longer answer is no, thank you. I am sorry but there comes a point where I won't do that."

*The Government's list of the prosectuion witnesses on whom defendants relied for expert advice (GB, p. 114n) is incomplete, and should include Joseph A. Mauriello, New York university professor (Tr. 2610-2615, 2689, 2693-2695) and Jerome Dienstag, a securities law specialist (Tr. 2999-3000). The point of that footnote - that the jury was fully justified in rejecting the good faith defense in light of that testimony - begs the question, which is not whether defendants failed to disclose some facts to the experts but whether that failure resulted from guile or lack of expertise. How the jury, given proper instructions, would have answered that question can only be ascertained by a new trial. See, e.g., United States v. Phillips, 217 F.2d 435, 442 (7th Cir. 1955).

During the side bar conference at the end of the charge, Mr. Gaynor* again brought the issue to the trial judge's attention (A 670-671), saying:

> "MR. GAYNOR: Your Honor, I want to get back to the one you said 'No, no, thank you' on. I didn't get a chance to say what I wanted to say, if you will permit me. That was that in a case of this kind a reliance is present. That an auditor, attorney, accountant cannot just close his eyes to statements made but one should exercise due diligence in his professional capacity to pursue it. That's what I had hoped to call your Honor's attention to before."

to which the Court's response was:

> "THE COURT: Okay. You have made your point but I'm not going to say anything now."

The second and third contentions of the Government ignore the fact that reliance goes to the question of specific intent to defraud, without which none of the defendants could have been convicted (A 599). It is, of course, the Government's burden to prove that intent beyond a reasonable doubt, and the fact that good faith reliance is often referred to as a defense does not mean that defendants need prove this good faith; rather, it is the Government's burden to prove the absence of good faith. The trial judge expressly so charged the jury (A 599-600) and the case law clearly supports the proposition. Thus in United

*Requests to charge were submitted jointly on behalf of the Stirlings and Yanowitch (A 118-150), including Request No. 21 dealing with good faith (A 145). Gaynor must, therefore, be deemed to be speaking for all three defendants in making this request. See United States v. Natelli, 527 F.2d 311, 329-330 (2nd Cir. 1975), cert. denied, 425 U.S. 934 (1976).

States v. Phillips, 217 F.2d 435 (7th Cir. 1955), the Court held it error to refuse an instruction on reliance, noting that defendant was under no duty to prove his good faith. The question then is not whether defendants have presented evidence as a basis for a specific instruction on reliance, but whether on the whole record there was any foundation in the evidence, by whomever presented, for giving instruction. See, e.g., United States v. Young, 464 F.2d 160, 164 (5th Cir. 1972); Bursten v. United States, 395 F.2d 976, 981 (5th Cir. 1968); United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971), cert. denied, 414 U.S. 1023 (1973); United States v. Grimes 413 F.2d 1376, 1378 (7th Cir. 1969); United States v. Phillips, supra; see also United States v. Clancy, 276 F.2d 617, 636 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (19). As already noted, the testimony of David Stirling and Harold Yanowitch and of the Government's witnesses furnished more than adequate basis for so doing.*

The Government's third contention - that the failure of the expert to discover the irregularities is irrelevant under a statute requiring disclosure -- flies in the face of the

*Bisno v. United States, 2 711 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962 United States v. McCormick, 67 F.2d 867 (2nd Cir. 1933), cert. denied, 291 U.S. 662 (1934), require advice concerning the specific course of action in question, rather than general advice, as a basis for such an instruction. However, the testimony of labor expert Kheel, securities experts Kramer and Dienstag, and accounting experts Murray and Mauriello were concerned not with generalities but with specific matters of which defendants stand convicted.

specific intent requirement which, as already noted, the trial judge charged had to be found for conviction. The question is not whether the failure to disclose resulted from negligence of the expert, but whether defendant can be charged with the expert's knowledge of what is required to be disclosed. When a defendant makes a report omitting data which he could not honestly believe not to be material to the report, reliance upon a professional for preparation of the report or advice in relation to its preparation is no defense when the omitted data has not been disclosed to the professional. United States v. Markham, 537 F.2d 187, 195 (5th Cir. 1976), cert. denied, 97 S.Ct. 739 (1977); United States v. Smith, 523 F.2d 771, 778 (5th Cir. 1975), cert. denied, 97 S.Ct. 59 (1977); United States v. Cox, 348 F.2d 294 (6th Cir. 1965). Reliance on professional advice is not an absolute defense, conferring immunity "regardless of wrongdoing on his [defendant's] part." (Linden v. United States, 254 F.2d 560, 568 [4th Cir. 1958]). In such a case there is no good faith reliance and, therefore, no reason to charge the jury that defendant may be found not to have the required intent if he disclosed what he believed to be material. See United States v. Cox, supra.

It is, however, a wholly different matter, especially when dealing with the highly technical issues of accounting, labor law and securities law involved in the charges of which defendants Stirling and Yanowitch stood accused, to make the good faith reliance that would permit the jury to find that

the defendants did not have an intent to defraud, turn upon whether "some of the important information is withheld and not disclosed" rather than upon whether such information was intentionally withheld, that is--was not disclosed notwithstanding an awareness that its disclosure was required. As already noted in defendants' main briefs (St. Br. 420; Y. Br. 49), the clear implication of this Court's decision in United States v. Crosby, 294 F.2d 928 (1961), cert. denied sub nom. Mittelman v. United States, 368 U.S. 984 (1962) is to the contrary. The only case dealing directly with the point which has been found is In re Soroko, 34 F.Supp. 825 (S.D.N.Y. 1940), cited by the Government as authority for its point of view, but in fact diametrically opposed to it.* In that case, the district court had considered a bankrupt's right to a discharge where he had omitted from his schedule of assets a claim against his brother-in-law which the bankrupt's attorney had advised him need not be listed because barred by limitations. The Court held that:

> "The referee reports that, assuming the testimony of the attorney to be true, the bankrupt did not fully or fairly set forth to him the facts from which the attorney could advise him whether his claim against his brother-in-law was barred by the statute of limitations and that the fact that this failure by the bankrupt may have been due to the failure of the attorney to elicit this information

*All of the other cases cited by the Government, except United States v. Tolkow, 532 F.2d 853 (2nd Cir. 1976) are discussed in the preceding text and need not be further distinguished in this note. In the Tolkow case, the point now argued by defendants Stirling and Yanowitch was not argued, and reliance was considered only in relation to sufficiency of the evidence and not in relation to what instructions should be given to the jury.

> because of his ignorance of the law, can not avail the bankrupt. It, however, does not appear in what respect the bankrupt's statement of the facts to his attorney was not a full and fair statement. . . Moreover, the statement of the facts by a bankrupt to his attorney may be a full and fair disclosure, such as will negative any fraudulent intent upon the part of the bankrupt, if the bankrupt stated all the facts which he and his attorney believed to be relevant. Ignorance of the law on the part of the bankrupt and his attorney may lead the attorney to advise his client without a knowledge of relevant information in the possession of the client. This may result in the bankrupt's statements under oath being false, but it does not itself render the statements intentionally false."
>
> --34 F.Supp. at 826
> (emphasis added)

The evidence in the instant case shows that defendants Stirling had only high school educations and that defendant Yanowitch, though an attorney, had only one prior experience with a securities registration and was essentially a commercial and real estate practitioner. In matters related to securities law they all sought out and relied upon the best professional advice: from Allan Kramer, an acknowledged securities expert, in relation to securities law; Theodore Kheel, an outstanding labor lawyer, in relation to labor law; and from William Murray of Peat, Marwick & Mitchell, one of the Big Eight accounting firms, and Professor Joseph A. Mauriello, of New York University, in relation to accounting principles. The case went to the jury under instructions that fraudulent intent could be found and good faith would be negated if the jury found that defendants had not disclosed

some "important information", but without any instruction to the jury that they could consider in that connection whether the non-disclosure was intentional. Such an instruction was required by the circumstances of this case. See, e.g., United States v. Ottley, 509 F.2d 667, 671 (2nd Cir. 1975).

The matter should be remanded for retrial under proper instructions on this issue.

III

THE FAILURE TO WITHDRAW CERTAIN SPECIFICATIONS FROM CONSIDERATION BY THE JURY WAS ERRONEOUS
(Replying to Point I of the Government's Brief)

The Government misconceives the argument made in Point III of the Stirling and Yanowitch briefs. Defendants Stirling and Yanowitch have not argued that the evidence in relation to the specifications referred to in the Natelli requests be stricken or withdrawn, for they recognize the relevance and admissibility of that evidence on the conspiracy count. What they did ask was that the specifications referred to in their respective requests to charge (A 171, 172) be withdrawn from the jury's consideration. Nor have they overlooked the vicarious liability principle enunciated in Pinkerton v. United States, 328 U.S. 640 (1946). What they do say is that, precisely because of the Pinkerton rule, it was confusing for the jury and unfair to defendants not to have withdrawn from consideration of the jury those specifications on which sufficient evidence had not been submitted as against them.

The Government appears to agree, for it states that "The defendants were at most entitled to a charge that the jury was not to consider the evidence against the defendant set out in the challenged paragraph as a basis for conviction on a substantive count but it was to consider that evidence against the defendant in deciding whether or not he was a member of the conspiracy or joint venture and in deciding whether the object of the conspiracy or joint venture was that set out in the indictment." (GB, p. 54) It argues, however, that the request to charge was not legally correct and, therefore, its refusal cannot constitute error. The deficiency in the charge, however, was that while it stated a correct principle of law, it asked for the application of that principle not only to the substantive counts but also to the conspiracy count.* The rule as to "a legally incorrect request" referred to by the Government (GB, p. 55) is, therefore, inapposite, for this Court should not so exalt form over substance as to refuse to consider a request embodying a correct legal principle simply because it was inapplicable to <u>one</u> of the <u>nine</u> counts of the indictment. In such a case, it was incumbent upon the trial judge to reword

*In fact, David Stirling's request to charge, which redounds as well to William Stirling's benefit (Stirlings' Brief, p. 44n), asks for withdrawal of paragraphs "of Count 1" and then further instructed the jury not to consider those charges as incorporated in the other counts. The Yanowitch request, though more broadly worded, should, fairly read, be regarded as asking similarly for the withdrawal of particular specifications in relation to each count of the indictment.

the request to limit its application to the eight substantive counts and reject it as to the ninth conspiracy count. See, e.g., Bursten v. United States, 395 F.2d 976, 982 (5th Cir. 1968).

There was prejudice to defendants in the trial court's not so doing because, a Pinkerton charge having been given, it is not possible to tell from the jury's verdict whether the conviction of defendants Stirling and Yanowitch on the substantive counts was vicarious or direct. Nor will it do for the Government to answer as it does that the jury was entitled "to hold each defendant liable for the foreseeable acts of his co-conspirator," (G.B., pp. 55-56) for the jury was only entitled and not required to do so, and it therefore cannot be ascertained that, as in Natelli, some of the substantive count convictions were not determinations by the jury of direct rather than vicarious responsibility on specifications as to which there was insufficient evidence.

What fairness to the defendants required in the instant case was a charge that dealt first with the conspiracy count, outlining what was necessary for a finding of a conspiracy with the object alleged in the indictment and for fixing the date of commencement of the conspiracy. With respect to the substantive counts, the jury should then have been charged that as to each count they should consider the evidence as to each defendant separately, that if they found any conspirator guilty of a particular count they then

could, but were not required to, find all members of the conspiracy guilty of that count provided they found the act of the directly guilty conspirator to have been a reasonably foreseeable act in furtherance of the conspiracy. They should then have been told that as to any defendant not found to have been a member of the conspiracy or any act of a directly guilty conspirator not found to have been reasonably foreseeable, a determination of guilt of a particular defendant could only be made if they concluded beyond a reasonable doubt from the evidence, exclusive of the evidence sought to be withdrawn from the jury's consideration by the requests under discussion, that that defendant was guilty of that act. Only in this manner could the instruction to the jury be the "focused individualized instruction" which the Government, in another context, concedes was required (GB, p. 100n), but which was not provided for defendants Stirling and Yanowitch, notwithstanding the fact that, as outlined in their main briefs (Stirlings' Brief, pp. 44-47; Yanowitch Brief, pp. 51-53) important specifications or parts of specifications were unsupported by the evidence.*

*Focused instructions on the substantive counts were especially important, if essential unfairness was to be avoided, in light of the sketchy nature of the evidence concerning any "agreement" between the Stirlings, Yanowitch and the other defendants. This Court, in United States v. Rosenblatt, No. 76-1443, decided April 19, 1977, has noted that "the gist of the offense remains the agreement and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant" (Slip opinion, 3035), yet the proof shows little more than that the Stirlings and Yanowitch were officers and counsel and worked for the success of the company, but establishes no specific conspiracy, no definition of its limits, and no date of origin.

The burden imposed upon conspiracy defendants when there are a number of defendants and a number of conspiracies alleged, the possible prejudice to individual defendants that evidence as to one will spill over as to the others and as to one conspiracy will become confused with another has been noted by the Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946). This Court's decision in Natelli recognizes, likewise, the prejudice that may arise from failure to withdraw an insufficiently proven specification forming part of a substantive count. The trial judge's refusal to withdraw the specifications referred to in the requests to charge presented by defendants Stirling and Yanowitch was equally prejudicial for it left the jury without adequate guidance concerning which specifications they could consider as to the direct liability of these defendants, if they did not find them vicariously liable as to any given count.

IV

YANOWITCH WAS DEPRIVED OF A FAIR TRIAL BY REASON OF THE TRIAL COURT'S FAILURE TO STRIKE, OR WITHDRAW FROM THE JURY'S CONSIDERATION, THE ALLEGATIONS RELATING TO STOCK PURCHASES FOR UNION OFFICIALS, THE EXCLUSION OF DEFENSE WITNESSES, AND THE LIMITATION OF CROSS-EXAMINATION OF PROSECUTION WITNESSES

(Replying to Points II and VII of the Government's Brief)

Yanowitch incorporates by reference the arguments set forth in the Stirlings' Reply Brief at pp. 21-32 and pp. 40-44.

V

YANOWITCH WAS DEPRIVED OF DUE PROCESS OF LAW BY REASON OF THE TRIAL COURT'S RULING THAT THE GOVERNMENT COULD USE HIS ADMISSION OF TAFT-HARTLEY VIOLATIONS, MADE IN CONNECTION WITH A NOLO CONTENDERE PLEA VACATED BECAUSE OF THE GOVERNMENT'S VIOLATION OF BRADY v. MARYLAND, IF HE TESTIFIED WITH RESPECT TO PARAGRAPH 10 OF THE INDICTMENT

By motion filed in this Court on July 18, 1977, Yanowitch and the Stirlings have moved to remand this appeal for a hearing in the District Court of their claim that the trial court improperly permitted the Government to use admissions made by David Stirling and Yanowitch in connection with their pleas to a Taft-Hartley Act indictment in the Western District of New York. By order dated July 12, 1977, while this appeal was pending, Judge Harold P. Burke vacated the pleas upon the ground that the Government had violated Brady v. Maryland, 373 U.S. 83 (1963).

At the present time, the motion for remand is still pending. By separate motion, also filed on July 18, 1977, Yanowitch and the Stirlings have requested permission to file supplemental briefs in this Court in the event that the Court declines to remand the case.

In the event that this Court declines to order both a remand and an opportunity to submit further briefs, Yanowitch respectfully requests that the Court deem the papers submitted on the remand motion, in which both the Government and appellants discuss the merits of this claim, as part of the briefs filed herein.

CONCLUSION

The judgment of conviction against Harold M. Yanowitch should be vacated, and the indictment dismissed or, in the alternative, a new trial ordered.

Dated: New York, New York
August 10, 1977

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ELIZABETH PEPE, being duly sworn, deposes and says that she is not a party to this action, is over 18 years of age and resides at 4320 Forman Avenue, Bronx, New York, 10466. That on the 10th day of August, 1977, deponent served the within Reply Brief of Defendants-Appellants David Stirling, Jr. and William Stirling and the Reply Brief of Defendant-Appellant Harold M. Yanowitch upon

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-and-

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attorneys for defendants William Schulz and Rubel Phillips, respectively, by depositing two copies each of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Elizabeth Pepe
ELIZABETH PEPE

Sworn to before me this
10th day of August, 1977.

Patricia Cavallaro
Notary Public

PATRICIA CAVALLARO
Notary Public, State of New York
No. 24-4501035
Qualified in Kings County
Commission Expires March 30, 1979

COPY RECEIVED
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U. S. ATTORNEY
SO. DIST. OF N. Y.
ROBERT B. FISKE JR.